No. 96-1335

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GREGORY ALAN SMITH,

Petitioner,

—v.—

METRO-NORTH COMMUTER RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY ALAN SMITH,
Petitioner,
-against-

METRO-NORTH COMMUTER RAILROAD,
Respondent.

PETITIONER'S REPLY BRIEF

Respondent's Misrepresentations of the Facts Surrounding The Accident Confirm That The Question of FELA Employment Must Be Submitted to the Jury in this Case

As its primary argument why this Court should deny the Writ of Certiorari, Respondent contends that the facts relative to the involvement of Metro-North employees at the time of the accident do not reflect that the railroad played a significant supervisory role in petitioner's activities at the time of the accident but instead "do nothing more than reflect a railroad's effort

to coordinate an independent contractor's work with its own operations . . . ." (Brief in Opposition, p. 8-9, citing Opinion below). But Respondent misrepresents what occurred at the time of the accident, in contradiction of deposition testimony.

After admitting that Metro North determined "where and when Asplundh employees performed their tasks", Metro-North challenges petitioner to "identify any evidence which indicates that the Metro-North pilot was also involved - - at the time of the petitioner's accident -- in deciding which shrubs to spray or how to spray, let alone that the pilot did the spraying" (Brief in Opposition, p. 8)(emphasis in original).[1]

But the accident did not occur while Petitioner Smith was spraying nor while pilot Vines was sitting in the passenger seat as alleged by Metro-North in their Brief in Opposition. The accident occurred, instead, after the Metro-North trainmaster ordered the

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[1] Petitioner has never alleged that the Metro-North pilot did any spraying. However, contrary to Respondent's contention, the record confirms that pilot Vines **did** from time to time direct petitioner, inter alia, with regard to which shrubs to spray and where not to spray (A64-7).

high-rail truck to stop to allow a through train to pass (A. 149). Petitioner testified that from his position on top of the high-rail truck he observed Metro-North pilot Vines exit the truck and walk back to throw a switch to allow the truck to be moved from the main track to the siding. That was the last thing he remembered. The Metro-North tower operator in whose "block" the high-rail vehicle was being moved testified that pilot Vines was "responsible for the movement of the vehicle subject to approval of the train dispatcher and the block operators", i.e., only Metro-North employees were responsible for movement of the truck (A. 145-6). Thus, at the time of the accident, petitioner was on top of the high-rail vehicle and he and the truck were about to be or were physically being moved to a siding on the orders of and under the direction of Metro-North.

Under FELA, the test of whether an employee of a third party contractor is also an employee of the railroad at the time of the accident is met if it can be demonstrated that, at the time of the accident, the railroad, through its employees, played "a significant supervisory role" as to the work of the injured employee, Kelley v. Southern Pacific Co., 419 U.S. 318, 327. This issue can be taken from the jury "only if reasonable men could not reach differing conclusions on the issue." Baker v. Texas and Pacific Railway Co., 359 U.S. 227, 228 (1959).

If the key substantial facts of record as to when the accident occurred are in such obvious dispute, let alone the facts regarding what the Metro-North pilot and the other Metro-North employees were actually doing when the accident occurred, a jury issue has been raised as a matter of definition. Baker, supra.[2]

The Appellate Division never analyzed the facts relating to how the accident occurred and relating to who was providing actual supervision at the time of the accident, because when the Appellate Division concluded that Asplundh was petitioner's general employer, they improperly ended their analysis and failed to make the required factual determination as to whether or not Metro-North was also petitioner's employer for FELA purposes at the time of the accident. Consequently, in total disregard for Baker and its progeny, that court took the case from the jury. It is respectfully submitted that this Court should not allow that grave error to stand.

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[2] Justice Schoenfeld, who denied summary judgment below, recognized that the accident occurred not while the spraying activities were in progress but, instead, after the truck was stopped upon orders of Metro-North (Petition 15a-16a.)

CONCLUSION

For the reasons stated above and in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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